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In The

Supreme Court of The United States

October Term, 1942.

No. 859.

SPERRY PRODUCTS, INC.,
Petitioner,

vs.

ASSOCIATION OF AMERICAN RAILROADS, ET AL.,
Respondents.

BRIEF FOR THE RESPONDENTS ON THE PETITION FOR WRIT OF CERTIORARI.

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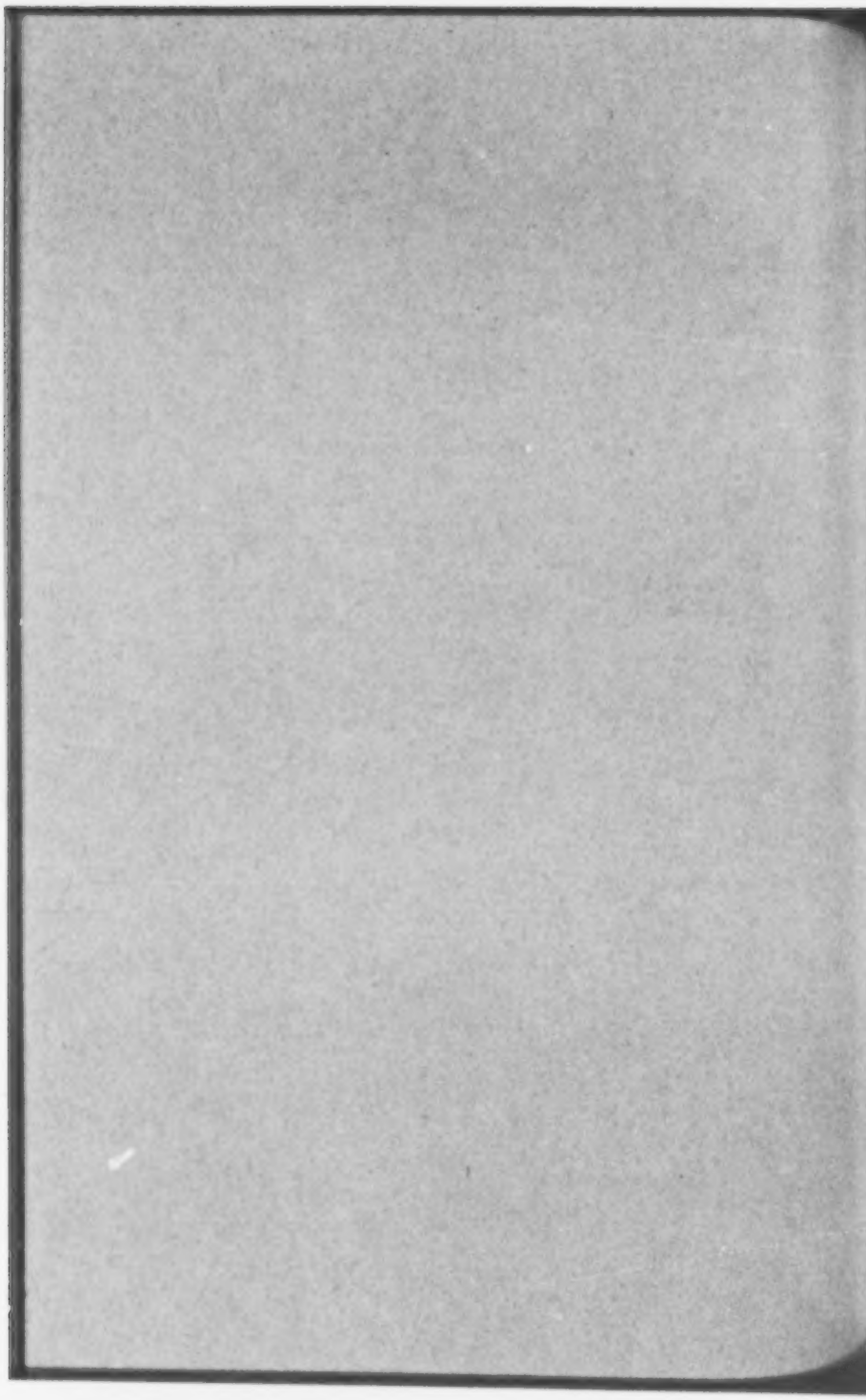

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BRIEF FOR THE RESPONDENTS ON THE PETITION FOR WRIT OF CERTIORARI.

The respondents understand that it is their duty to see that both sides of the case are presented to this Court and to give all reasonable refutation to the petitioner's position, although they need not disagree with the petitioner as to the desirability of review on a limited phase of one question said to be presented. (*Furness, Withy & Co.* v. *Yang-Tsze Ins. Assn.*, 242 U. S. 430, 37 S. Ct. 141, 61 L. Ed. 409; 8 Hughes Federal Practice 508 and 514). The following is offered to discharge that duty.

JURISDICTION.

The petition, the brief, and the record were filed within the time prescribed by Sec. 8 of the Act of February 13,

1925, and the jurisdiction of this Court is invoked under Sec. 240(a) of the Judicial Code as amended February 13, 1925, c.229 (43 Stat. 938 (28 U. S. C. A. 347)).

THE OPINIONS OF THE COURTS BELOW.

The opinion of the District Court by Judge Conger was filed January 12, 1942. It appears at page 42 of the record and is reported in 44 Fed. Supp. 660.

The opinion of the Circuit Court of Appeals (Circuit Judges L. Hand, Chase, and Frank, Judge Hand writing, Judge Frank concurring) was filed December 14, 1942, and appears at page 59 of the record. It is reported in 132 F. (2d) 408.

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED.

What is said under this heading in the Cross-Petition of the Association and The Long Island Rail Road, No. 860, at page 2, is preferable to the statement in the Petition of Sperry Products, Inc., No. 859.

THE QUESTIONS PRESENTED.

The questions stated in the petition (page 2) are believed to be broader than those presented by the opinion and judgment of the Circuit Court of Appeals.

"Question 1. Is such an association suable under the patent venue statute, Judicial Code, Section 48, 28 U. S. C. A. 109?"

By "such an association" the petitioner evidently refers to "an unincorporated association having members residing in more than one district of the federal judicial system," as its next preceding sentence is worded.

Neither court below at any time decided that such an association was not suable under that Section of the Judicial Code.

It has never been denied that the Association could be sued

> "* * * in any district in which a defendant whether person, partnership, or corporation, shall have committed acts of infringement and have a regular and established place of business."

as provided by what is usually known as the second part of Section 48 of the Judicial Code.

In the respondent Association's briefs below it made the following statement:

> "The defendant Association has a place of business in the Northern District of Illinois and alleged acts of infringement have been committed in that district. All this is well known to the plaintiff."

A similar statement was made in open court on June 27 1941, in answer to a question from Judge Morris of the District Court of the District of Columbia. That was before the plaintiff filed the instant suit on July 9, 1941.

But the petitioner passed that situation by and chose to demand the privilege of suing the Association in a district where it is privileged not to be sued for infringement, and in which but a single admittedly innocent member is an inhabitant and but one director resides. The choice was for petitioner's convenience, whereas the Statute gave the choice of convenience to the defendant, who is a respondent here.

We think the first question should be much more specific than is stated in the petition, and should deal with whether or not, in view of the second part of Section 48 quoted at the top of this page, "inhabitancy" under the first part of that Section should be attributed to the Association in the district where its principal place of business is located, as though it were a single jural person and not an aggregate (R. 61, 62).

THE SECOND QUESTION.

The second question in the petition is—

"Can the members of such an association be sued in a class action when there is venue of one member and a director of the Association?" (Petition, p. 2.)

Again, we think the question too broad. It should be limited:

(a) to a suit for infringement of Letters Patent under the express and intended limitations of Section 48 of the Judicial Code; and

(b) to a District Court in a state in which the law places the alleged infringing Association outside of the "except clause" in Rule 17(b) R. C. P.; and

(c) to a condition shown by proof that there will be a failure of justice unless a class suit is permitted.

Perhaps the petitioner omitted these necessary limitations because each would seem to make a negative answer unavoidable.

Later, on page 7, the petitioner indicates that its questions should have been much restricted—thus:

> "Petitioner urges that the district court had jurisdiction of the Association, because it had a principal place of business in the southern district of New York, and a member, the Long Island, was resident there, as well as a director and member of the executive committee of the Association, Williamson, and that, in the alternative, the district court had jurisdiction of the members of the Association in a class action. Petitioner prays that this Court grant the writ and so decide."

However, the petitioner admitted below that there is no authority for the first proposition, and it urged that the very absence of authority is itself an important authority.

But, of course, the absence of authority for federal jurisdiction spells the absence of jurisdiction.

As to the second proposition on the class action, there is neither authority to sustain it under the limitations of Sec. 48 of the Judicial Code, nor is there a showing that justice will fail unless a class suit is permitted.

THE COMPLAINT IS UNUSUAL.

Immediately following the second question on page 2, the petition reads:

> "In the present case, the **usual** complaint in a patent infringement suit was filed * * *"[1]

But instead of being usual, the complaint is decidedly unusual. Apparently no one ever before attempted to sue an association for infringement as an inhabitant under the first part of Section 48 of the Judicial Code when its members included citizens or inhabitants of Canada and more than two-thirds of the states of the United States.

Apparently no one ever before alleged that such an association is an inhabitant of any district within the meaning of Section 48 of the Judicial Code.

Apparently no one ever filed suit against six members incorporated in the state of the suit (but only one of whom is an inhabitant of the district of the suit) for the sole purpose of getting jurisdiction over the association under Section 48 of the Judicial Code.

It seems quite certain that no one ever followed such a suit with a letter to each of five of the members thus named as representatives, explaining that each was admittedly innocent and that there was no intent even to state a cause of action against it as distinguished from the association.

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[1] Emphasis ours unless otherwise stated.

And it seems equally certain that no one ever before asked a court to take jurisdiction over an association and its members in a class action under Section 48 of the Judicial Code and the circumstances surrounding this suit.

We should say that the complaint is perhaps unique.

PRIOR SUIT IN THE DISTRICT OF COLUMBIA.

On page 4, the petitioner attempts to make some kind of capital out of having first sued the Association in the District of Columbia as an inhabitant of that district, and, having entered a voluntary dismissal after objection to the jurisdiction. This Court should not infer, however, that the dismissal came promptly after the objection to the jurisdiction. On the contrary, the petitioner moved for leave to take testimony of the Association's officers in an effort to show jurisdiction; and, at the hearing on that motion, the petitioner tried to keep the question of jurisdiction from being raised, but the Association insisted that the court was so clearly without jurisdiction that it should not even grant leave to take testimony to investigate the question. After discussing the Second Circuit's decision in *Levering et al.* v. *Morrin*[1] and the cases relied upon in that decision, together with the *Puerto Rico* decision[2] of this Court citing the *Levering* v. *Morrin* decision with approval, Judge Morris indicated that he would deny the petitioner's motion for leave to take testimony for want of jurisdiction, and he gave the petitioner one week in which to file a brief of authorities. Being unable to find any authorities to its purpose, the petitioner did not file the brief, but then noted a voluntary dismissal.

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[1] *Levering et al.* v. *Morrin*, 61 F. (2d) 115 (C. C. A. 2).

[2] *Puerto Rico* v. *Russell*, 288 U. S. 476 at 480, 53 S. Ct. 447, 77 L. Ed. 903 at 907.

ARGUMENT IN THE PETITION TRAVERSED.

(Petition, pp. 5 and 6.)

It seems to us that the argument on pages 5 and 6 of the petition is too frail to persuade that inhabitancy should be attributed to the Association under Section 48. For convenience we reply here rather than under the heading "Argument" on page 11.

The petitioner says (page 5) that an unincorporated association having members inhabiting more than one district should not be in a better position with respect to venue or jurisdiction than an individual or a corporation. However that may be, the Constitution and the settled doctrine as to the status of unincorporated groups for the purpose of federal jurisdiction has made the position of such an association different from that of a corporation or an individual. This Court does not hold that either a voluntary association of persons, or an association into a body politic, created by law, is a citizen of a state within the meaning of the Constitution. It has said that the rule of jurisdiction based on the corporate fiction must not be extended and it has always been unwilling to extend that rule to embrace partnership associations and other unincorporated groups.[1] What is but an association of individuals for so many ends and a juridical entity for only a few, is not easily to be treated as if it were a single citizen.[2]

But assuming, for argument only, that an unincorporated association having members inhabiting more than one district should not be in a better position with respect to venue than a person or a corporation, the converse should be true and it should not be in a worse position. However, the petitioner has contended (unsuccessfully) from the outset of this suit that the Association is an inhabitant of any

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[1] *Great Southern Fire Proof Hotel Co.* v. *Jones*, 177 U. S. 449 at 454 and 457, 44 L. Ed. 842 at 843 and 844.

[2] *Puerto Rico* v. *Russell*, 288 U. S. 476 at 480, 53 S. Ct. 447, 77 L. Ed. 903 at 907.

district in which one of its members is an inhabitant (R. 44), and that would make it an inhabitant of Canada, Mexico, and more than two-thirds of the states of the United States (R. 3, 101, and 102), whereas the law contemplates that every person or corporation shall have but one domicile.[1] And it seems that the contention must be clearly contrary to the language and intent of Sec. 48 of the Judicial Code as found by this Court in the recent Stonite decision.[2] cf. *Sutherland* v. *U. S.*, 74 Fed. (2d) 89 at 93.

NO ASSOCIATION HAS EVER YET ESCAPED LIABILITY FOR INFRINGEMENT UNDER SEC. 48 J. C.

Beginning in the last line of page 5, the petitioner says:

> "* * * But such an association would be wholly free from liability, if it did not infringe in the same district in which it had a regular and established place of business, unless it can be sued somewhere as 'an inhabitant.'"

That wolfish specter appears never to have existed in real life. Section 48 of the Judicial Code has been in force for more than forty-five years and the situation has not arisen in any reported case.

This Court has a firmly established rule that a statute will not be held broadly invalid because its language extends to some class as to which its operation would be constitutionally forbidden. It will not consider such a question until the objection is made by one of the class which has a right to complain. This rule, or a corollary under it, should apply to the instant situation and it would seem incumbent upon a complainant to allege and prove to the

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[1] *Galveston et al.* v. *Gonzales*, 151 U. S. 496 at 506, 38 L. Ed. 248 at 252.

[2] *Stonite Products Co.* v. *Lloyd Co.*, 315 U. S. 561, 86 L. Ed. 1026.

court that the second part of Section 48 failed to give jurisdiction over a defendant Association before asking the court to attribute inhabitancy to the Association as though it were a single jural person under the first part of Section 48, or to assume jurisdiction in the emergency procedure known as a class action. The petitioner has not only failed to do these things, but has arbitrarily insisted on jurisdiction over the defendant Association in a district in which but a single admittedly innocent member is an inhabitant.

The infringement complained of in the instant suit was committed by the Association and The New York Central (R. 36), but the petitioner chose the Southern District of New York to bring the suit, when admittedly The New York Central is not an inhabitant of that district, and no act of infringement is alleged to have been committed there. The choice was arbitrary and affords no excuse for complaint about lack of jurisdiction under the Statute with respect to either that railroad or the Association.

Even though it be possible for Congress to include the case at bar within the Constitutional grant (which may well be doubted), Congress has not done so. The result is not to deny justice to the petitioner, who can sue in one of the districts mentioned in Sec. 48 of the Judicial Code. It goes no further than to give the defendant in a suit for infringement the privilege intended by the Statute.

A similar explanation was given by the Circuit Court of Appeals in *Ex Parte* Edelstein[1] at the close of the majority opinion, in which Circuit Judges Learned Hand and Augustus Hand, over the dissent of Judge Manton, declined to attribute citizenship to an unincorporated association organized under the General Association Laws of New York, and having its principal place of business within the Southern District, and its president, secretary, and treas-

[1] *Ex Parte Edelstein*, 30 F. (2d) 636 at 638 (C. C. A. 2).

urer, and all but 62 of its 8,000 or 10,000 members citizens of New York and operating as a labor union under charter from the American Federation of Labor. In *Levering* v. *Morrin*,[1] Circuit Judges Manton, L. Hand, and Swan declined to reverse the court's ruling in *Ex Parte Edelstein*. Seven months later, this Court cited the Levering decision with apparent approval.[2]

NOVEL QUESTIONS.

On page 7 of the petition under the heading "Questions Involved," the petitioner says:

> "The two questions presented are of federal law, they are apparently novel, and they are of great public importance and interest, * * *."

Perhaps their importance and interest may be judged by their novelty, and by the apparent fact that Sec. 48 has been serving the intended purpose for more than forty-five years without those questions having been raised.

On the other hand, the more limited question that arises from attributing "inhabitancy" to the Association in the district in which its principal place of business is located, and thereby taking away the privilege of more than two hundred members not to be sued for infringement in that district, assumes an importance and a public interest worthy of consideration.

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[1] *Levering* v. *Morrin*, 61 F. (2d) 115 at 118 (C. C. A. 2).
[2] *Puerto Rico* v. *Russell*, 288 U. S. 476 at 480, 53 S. Ct. 447, 77 L. Ed. 903 at 907.

"REASONS RELIED UPON FOR THE GRANT OF A WRIT OF CERTIORARI."

On pages 8 and 9 of the petition, under this heading, the petitioner includes eight numbered paragraphs. We understand from Section 5(a) and (b) of Rule 38 of this Court, that special and important reasons are required to invoke the Court's discretion in favor of a petition and that five most likely reasons are to be found in Section 5(b) of that Rule. Instead of stating such reasons, the eight numbered paragraphs on pages 8 and 9 appear to be a mere catalog of points that the petitioner thinks should be the law, but which are not so stated in Section 48 of the Judicial Code. Those things might be made the basis of our appeal to Congress for legislation, but they do not seem to bear on the desirability for a review of the judgment and opinion of the Circuit Court of Appeals.

ARGUMENT.

We shall attempt to make our reply to the petitioner's argument follow the points as indicated in the petitioner's brief, pages 13-19.

POINT I.

"THE ASSOCIATION IS SUABLE AS AN ENTITY."
(Petitioner's Brief, p. 13.)

Under this heading, the petitioner makes the broad statement that

> "An unincorporated association is suable as an entity in its common name to enforce a federal substantive right. * * *"

That statement is entirely too broad, for it omits the important proviso that is made necessary by Rule 17(b) R. C. P.; namely—

> That the law of the state in which the District Court is held does not give the association the capacity to be sued.

The language of the rule would seem to make it plain that, if an unincorporated association has capacity to be sued by the law of the state in which the District Court is held, the capacity of an unincorporated association to be sued must be determined by the law of that state; and it is when, and only when, an unincorporated association "has no such capacity by the law of such state" that it may be sued "in its common name to enforce a federal substantive right," as expressed in the petition (Page 13). If the state law gives an association capacity to be sued, its capacity is determined by that state law and not by the "except clause" in the rule.

It should be noted that suit against an association "in its common name" is mentioned in the "except clause" only of the rule. The first part of the last sentence in paragraph (b) of the rule deals with capacity, and does not specify in what name an unincorporated association may be sued when the capacity has been determined by the law of the state.

On page 13, the petitioner quotes Rule 17(b), which follows:

> (b) Capacity To Sue or Be Sued. The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of his domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. **In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held**; except that a partnership or other unincorporated association, **which has no such capacity by the**

> **law of such state**, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States."

And then, because the suit is based on patent infringement, the petitioner assumes that the rule permits the respondent Association of American Railroads to be sued in its common name in the Southern District of New York for patent infringement.

But there is neither allegation nor proof that the Association of America Railroads

> "has no such capacity by the law"

of New York—

> "the state in which the district court is held,"

and which, by the plain language of the rule, is necessary to make the "except clause" apply.

And the Consolidated Laws of New York, Chapter 20—General Association Law, appear to show that the situation does not come within the "except clause" of the rule, for it provides:

> "Sec. 13. **Action or Proceeding Against Unincorporated Association.** An action or special proceeding may be maintained, against the president or treasurer of such an association, to recover any property, or upon any cause of action, for or upon which the plaintiff may maintain such an action or special proceeding, against all the associates, by reason of their interest or ownership, or claim of ownership therein, either jointly or in common, or their liability therefor, either jointly or severally. Any partnership, or other company of persons, which has a president or treasurer, is deemed an association within the meaning of this section." (Added by L. 1920, ch. 915, April 15, 1921.)

There seems to be no room for doubt that capacity to be sued is given by that Statute to the Association of American Railroads, and that provision is made for "an action or special proceeding * * * against the president or treasurer of such an association * * * for or upon which the plaintiff may maintain such an action or special proceeding, against all the associates, by reason of * * * their liability therefor, either jointly or severally."

Hence, under Rule 17(b) R. C. P. the capacity of the Association of American Railroads to be sued in a District Court in the State of New York is to be determined by the law of that state and not by the "except clause" of Rule 17(b). But, unfortunately for the petitioner, the law that gives the capacity to the Association permits the action against the president or treasurer, and both those officers are in Washington, D. C. (R. 83), and not subject to process in the Southern District of New York.

The situation is similar to that in which the law of the State of New York gives capacity to the Delaware & Hudson Railroad Corporation to be sued, but fixes its residence in the Northern District of New York. (*Wood* v. *Delaware & Hudson Railroad Corporation*, 63 Fed. (2d) 235, C. C. A. 2.) In the instant suit, the complaint was dismissed as to the Delaware & Hudson Railroad Corporation for want of venue (R. 50 and 52), and the petitioner acquiesced. (Petition, page 2.) So, even though the law of New York may give capacity to be sued under Rule 17(b) R. C. P., it does not at all follow, but rather the contrary, that the Association of American Railroads, with its far-flung membership, including the Delaware & Hudson Railroad Corporation and more than 200 other non-inhabitants, is suable as an entity inhabitant of the Southern District of New York within the meaning of Sec. 48 of the Judicial Code.

RULE 17(b) R. C. P. RELATES TO CAPACITY AND NOT TO FEDERAL JURISDICTION.

Rule 17(b) relates to Capacity to Sue or Be Sued whether a corporation or an unincorporated association, but it has nothing to do with jurisdiction over either. The Committee's notes under Subdivision (b) include

> "For capacity see * * * specifically * * * *David Lupton's Sons Co.* v. *Automobile Club of America*, 225 U. S. 489 (1912) (corporation); *Puerto Rico* v. *Russell & Co.*, 288 U. S. 476 (1933) (unincorporated ass'n.); *United Mine Workers of America* v. *Coronado Coal Co.*, 259 U. S. 344 (1922) (federal substantive right enforced against unincorporated association by suit against the association in its common name without naming all its members as parties). This rule follows the existing law as to such associations, as declared in the case last cited above."

Nothing is said about extending jurisdiction and Rule 82, expressly provides that:

> "These rules shall not be construed to extend or limit the jurisdiction of the district courts of the United States or the venue of actions therein."

At the Cleveland Proceedings, Hon. Wm. D. Mitchell, Chairman of the Supreme Court Advisory Committee, said (at page 188):

> "Jurisdiction and venue are unaffected. That is stated in Rule 82, but the rule is really surplusage, because the **jurisdiction and venue are matters of substantive right** and not proper pleading, practice or procedure."

Later, the Hon. Robert G. Dodge, Member of the Supreme Court Advisory Committee, said:

> "Rule 82, a very important rule: 'These rules shall not be construed to extend or limit the jurisdiction of the district courts of the United States or the venue of actions therein.' So that wherever you have a question arising under a venue statute or under a jurisdictional statute, the rules yield to the statute and there is no conflict. The venue statutes and the jurisdictional statutes are not affected or attempted to be affected." Cleveland Proceedings, 1938, pp. 355, 356.

At the New York symposium, Mr. Mitchell said:

> "The jurisdiction of the federal courts and venue in the federal courts are subjects unaffected by the rules, as stated in Rule 82, and that would be true in any event, because those are **matters of substantive right.**" New York and Washington Proceedings, 1938, p. 231.

The Act of June 19, 1934, under which the Rules of Civil Procedure were prescribed, provided this limitation:

> "Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant." 28 U. S. C. A. 723 (b).

Immunity from suit except within the district defined by Section 48 of the Judicial Code (28 U. S. C. A. 109) is a matter of substantive law. *Durabilt* v. *Berger*, 21 Fed. (2d) 139 (D. C., Ohio) at page 141 (Westenhaver).

Prof. Moore said:

> "A partnership or other unincorporated association is not a citizen for jurisdictional purposes. The fictional treatment that has been accorded to corporations has not as yet been extended to them." Moore's Federal Practice under the New Federal Rules, Vol. 1, page 508.

The notes under Rule 17 (b) show that the rule makers carefully followed existing law on the capacity of Associations to sue and be sued and were cognizant of the latest decision of this Court on the jurisdictional rule. *Puerto Rico* v. *Russell*, 288 U. S. 476, 53 S. Ct. 447, 77 L. Ed. 903.

POINT II.

"THE SOUTHERN DISTRICT COURT OF NEW YORK HAD VENUE OF THE ASSOCIATION."

(Petitioner's Brief, p. 14.)

Under this heading, the petitioner says:

> "Venue is a matter of the convenience of the litigants. It is very different from jurisdiction. The only questions involved here are those of venue, namely of the personal privileges of the Association and of its members to be sued in courts preferred by them."

Section 48 of the Judicial Code was enacted to give a personal privilege to the defendant in suits for infringement of Letters Patent, not the plaintiff; and, in defining that privilege, it says that the District Courts shall have "jurisdiction" in certain specified districts. From this, it would seem that "jurisdiction" could not be so very different from venue in those suits. And from this Court's decision in the *Stonite* case[1] it appears that

> "* * * there is little reason to assume that Congress intended to authorize suits in districts other than those mentioned in that Act."

It seems significant to us that no one ever before alleged that an unincorporated association was an "inhabitant" within the meaning of Sec. 48.

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[1] *Stonite Products Co.* v. *Lloyd Co.*, 315 U. S. 561 at 567, 86 L. Ed. 1026 at 1030.

IN THE CORONADO CASE JURISDICTION WAS FOUNDED ON THE SHERMAN ACT.

On page 15 of the petitioner's brief, it points out that, in the *Coronado*[1] litigation, neither the Circuit Court of Appeals for the Eighth Circuit nor this Court passed on the question of jurisdiction over the defendants. That was a natural consequence from the fact that the jurisdiction of the District Court over the defendants rested on the broad provisions of the Sherman Act, and, therefore, the question of diversity of citizenship or inhabitancy did not come up.[2]

DIVERSITY CASES ARE GUIDING PRECEDENTS.

Further down on page 15 in its brief, the petitioner points out that the District Court relied upon diversity cases (R. 45), such as *Levering* v. *Morrin*[3] and the decisions of this Court cited therein, whereas the petitioner says that the Circuit Court of Appeals rightly distinguished diversity cases (R. 61). But the petitioner does not appear to be whole-heartedly in favor of such a distinction, for immediately after stating its first question (p. 2) about Sec. 48 of the Judicial Code it adds in parentheses:

> "(A suit against such an association as 'an inhabitant,' under the general venue statute, Judicial Code, Sec. 51, 28 U. S. C. A. 112, footnote, p. 5, would present the same question.)"

And it does not pause to explain why a suit under Sec. 51 can present the same question as a suit under Sec. 48, and yet decisions as to the jurisdiction over the defendant under Sec. 51 are not relevant to this suit under Sec. 48.

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[1] *United Mine Workers of America* v. *Coronado Coal Co.*, 259 U. S. 344, 42 S. Ct. 570, 66 L. Ed. 975.

[2] *Ex Parte Edelstein*, 30 Fed. (2d) 636 at 638 (C. C. A. 2).

[3] *Levering* v. *Morrin*, 61 F. (2d) 115 (C. C. A. 2).

RE KEASBEY & MATTISON CO.[1]

This Court's decision in *Re Keasbey & Mattison Co.* would seem to be against the suggested distinction. Commenting on paragraph (a) of Sec. 51, when it was Sec. 739 R. S., Mr. Justice Gray said:

> "The last clause is added by way of proviso to the next preceding clause, which, in its present form, forbids any suit to be brought in any other district than that of which the defendant is an **inhabitant**; and the effect is that, in every suit between citizens of the United States, when the jurisdiction is founded upon any of the grounds mentioned in this section, other than the citizenship of the parties, it must be brought in the district of which the defendant is an inhabitant; but when the jurisdiction is founded only on the fact that the parties are citizens of different states, the suit shall be brought in the district of which either party is an **inhabitant**. And it is established by the decisions of this court that, within the meaning of this act, a corporation cannot be considered a citizen, an inhabitant, or a resident of a state in which it has not been incorporated; and, consequently, that a corporation incorporated in a state of the Union cannot be compelled to answer to a civil suit, at law or in equity, in a circuit court of the United States held in another state, even if the corporation has a usual place of business in that state. *McCormick Harvesting Mach. Co.* v. *Walthers*, 134 U. S. 41, 43 (33:833, 834); *Ex parte* Shaw (*"Shaw* v. *Quincy Min. Co."*) 145 U. S. 444 (36:768); *Southern Pac. Co.* v. *Denton*, 146 U. S. 202 (36:942). **Those cases, it is true, were of the class in which the jurisdiction is founded only upon the fact that the parties are citizens or corporations of differ-**

[1] *Re Keasbey & Mattison Co.*, 160 U. S. 221 at 228 and 229, 40 L. Ed. 402 at 405.

> **ent states. But the reasoning on which they proceeded is equally applicable to the other class, mentioned in the same section, of suits arising under the Constitution, laws, or treaties of the United States; and the only difference is that, by the very terms of the statute, a suit of this class is to be brought in the district of which the defendant is an inhabitant, and cannot, without the consent of the defendant, be brought in any other district, even in one of which the plaintiff is an inhabitant."** (160 U. S. 221 at 228 and 229, 40 L. Ed. 402 at 405.)

This was written less than two years before the Act of March 3, 1897 (now Sec. 48 of the Judicial Code) was passed

> "* * * to define the exact jurisdiction of the Federal courts in actions to enforce patent rights and thus eliminate the uncertainty produced by the conflicting decisions on the applicability of the Act of 1887 as amended (now paragraph (a) of Sec. 51 of the Judicial Code) to such litigation."[1]

With this history, the term "inhabitant" in Sec. 48 could hardly have been used in any larger sense than in Sec. 51, or as used in the paraphrase by this Court in *Re Keasbey & Mattison*:

> "* * * but when the jurisdiction is founded only on the fact that the parties are citizens of different states, the suit shall be brought in the district of which either party is an **inhabitant.** * * *" (160 U. S. 229, 40 L. Ed. 405.)

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[1] *Stonite Products Co.* v. *Lloyd Co.*, 315 U. S. 561 at 565, 86 L. Ed. 1026 at 1029, column 2.

It therefore seems to us that decisions that an unincorporated association is not an inhabitant or resident for the purpose of jurisdiction under Sec. 51 should have helpful application to a suit against an association under Sec. 48, though the reverse might not be true.

The District Court was right in relying on the diversity case of *Levering* v. *Morrin* and the decisions of this Court cited in it and later cited with it in the *Puerto Rico* case, and it correctly applied the doctrine. The Circuit Court of Appeals for the Eighth Circuit has also correctly applied the doctrine to a suit against the partnership under the National Industrial Recovery Act.

SUTHERLAND v. U. S.[1]

In the *Sutherland* case, suit was brought in the district of Nebraska against a partnership composed of husband and wife living in Kansas City, Missouri, and neither being a resident, citizen, or inhabitant of the district of Nebraska, although the partnership had a place of business in Omaha, Nebraska. (74 F. (2d) 90, column 1.)

In determining that the suit could not be maintained against the partnership in Nebraska, the Circuit Court of Appeals for the Eighth Circuit (Circuit Judges Gardner, Sanborn and Woodrough, Judge Sanborn writing) assumed that the partnership was, under the laws of Nebraska, a separate legal entity with a domicile in the district, that it was properly served with subpoena, and that the National Industrial Recovery Act (48 Stat. 195) requires that it be treated as a person for the purposes of federal jurisdiction. (74 Fed. (2d) 90, column 2.) And, relying on the *Puerto Rico* and *Levering* decisions, together with the decisions of this Court prior to the *Coronado* case, it held that a partnership is to be regarded as an inhabitant of the state of which the partners are citizens, and no other. (74 Fed. (2d) 93.)

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[1] *Sutherland* v. *The United States*, 74 F. (2d) 89.

THE GOVERNMENT TRIED TO DISTINGUISH DIVERSITY CASES.

The Government there contended that the authorities which hold that the citizenship of a firm is to be determined by the citizenship of the partners are not applicable to a case where the jurisdiction is based on grounds other than diversity, and argued that, although the partnership is a citizen of Missouri, it can still be an inhabitant of Nebraska and in fact an inhabitant of every state in which it has a place of business and by the laws of which it is recognized as a distinct legal entity. The Circuit Court of Appeals, however, noted that the same suggestion had been advanced with respect to corporations and rejected, and it quoted, as we have done above (p. 19), from the earlier decision of this Court in *Re Keasbey & Mattison*, where it held that the reasoning of the diversity cases is equally applicable to the other class of cases, and the only difference is that by the very terms of the Statute, as in the case of Sec. 48 of the Judicial Code, the suit is to be brought in the district in which the defendant is an inhabitant and cannot, without the consent of the defendant, be brought elsewhere.

It seems to us that the District Court in the instant case and the Circuit Court of Appeals for the Eighth Circuit correctly applied the long-settled doctrine of this Court about the status of unincorporated groups for the purpose of federal jurisdiction, and that the decision and judgment of the Circuit Court of Appeals for the Second Circuit in this case is in conflict with that doctrine.

POINT III.

"THE MEMBERS OF THE ASSOCIATION WERE SUABLE IN A CLASS ACTION."

(Petitioner's Brief p. 16.)

Under this heading the petitioner argues that, if the Association as an entity is not suable in the Southern District of New York, the members are suable in a class action in that district.

The history of the class suit teaches that it is an emergency proceding. It is permitted when to deny it would result in a failure of justice, and then only.

The mere fact that the Association of American Railroads is not suable as an entity in the Southern District of New York for infringement alleged to have been committed elsewhere does not even suggest a failure of justice. At most, it suggests that the convenience of the defendant has been given preference over that of the plaintiff, as Sec. 48 was intended to do, and just as the District Court by the petitioner's admission correctly held, that the Statute did do with respect to the alleged infringer, New York Central, and four other members who are not inhabitants of the Southern District of New York.

Since the petitioner has not even alleged, much less shown, that denial of jurisdiction over the Association of American Railroads in the Southern District of New York would result in a failure of justice, it should not be heard on the class suit at all.

The second part of Sec. 48 of the Judicial Code provides that the District Courts of the United States shall have jurisdiction in any district in which the defendant, whether a person, partnership, or corporation, shall have committed acts of infringement and have a regular and established place of business. The petitioner has not

even alleged that jurisdiction over the Association of American Railroads cannot be had under that provision in spite of the well known fact that the Association has an office in Chicago, Illinois, and alleged acts of infringement have been committed in the Northern District of Illinois, which includes Chicago.

In every alleged act of infringement by the use of the Association's magnetic car X-201, some member railroad corporation is involved as a party to the use. The petitioner has not alleged, much less shown, that jurisdiction is not to be had under either part of Sec. 48 of the Judicial Code as to those alleged instances of infringement.

The alleged infringement complained of in the complaint "was committed by the A. A. R. and The New York Central Railroad" (R. 36). Yet the petitioner has arbitrarily chosen to bring suit in a district where The New York Central is admittedly not an inhabitant (Petition, pages 2 and 3), and where there has been no infringement (Petition, page 4).

It has been held, with the acquiescence of the petitioner (petition, pages 2 and 3), that five of the Association's members who are incorporated in the state of New York, including The New York Central, who is the only one alleged to have infringed individually, cannot be sued in the Southern District of New York because they are not inhabitants there (R. 49, 50, and 59). But the petitioner seeks to circumvent the Statute and those rulings that have been made under it by resorting to a class suit.

Both of the Courts below held that the action is not a proper class suit under Rule 23 (a) (3) (R. 47 and 63), and the Circuit Court of Appeals pointed out that the class suit is a device used by courts to prevent a failure of justice, and no such failure is imminent in the instant suit (R. 63). It seems hardly possible to conceive of suing the members of the Association of American Railroads in

a class suit without overriding the language and intent of Sec. 48 of the Judicial Code to restrict the former broad venue and to limit it to the particular districts mentioned in the act.

POSITION NOT SUPPORTED BY DECISIONS.

The decisions relied upon by the petitioner (page 16) do not support its position.

In *Gibbs* v. *Buck*[1], Mr. Justice Reed said:

> "No issue is made as to the standing of the Society or its members to sue."

And the defendants were all state officers within the district. There is no suggestion of a class action against an Association and its more than two hundred members for patent infringement.

In *McDaniel* v. *Board of Public Instruction*[2] the defendant, Board of Public Instruction, was in one county in the Northern District of Florida. That suggests nothing about a class action against an association and its more than two hundred non-inhabitant members for patent infringement.

In *Independence Shares Corp. et al.* v. *Deckert et al.*,[3] the defendant was

> "a Pennsylvania corporation and certain affiliated companies."

There is no indication that any defendant was not an inhabitant of the district.

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[1] *Gibbs* v. *Buck*, 307 U. S. 66 at 71; 83 L. Ed. 1111 at 1115.

[2] *McDaniel* v. *Board of Public Instruction*, 39 Fed. Supp. 638.

[3] *Independence Shares Corp. et al.* v. *Deckert et al.*, 108 Fed. (2d) 51 (C. C. A. 3).

National Hairdressers' & Cosmetologists' Assn., Inc., et al. v. *Philad Co.*[1] was a class action to declare invalid and not infringed a patent owned by a Delaware corporation, an inhabitant of the District. And, in the Third Circuit, the jurisdiction in a declaratory judgment suit is controlled by Section 51 and not by Section 48.[2]

None of these cases suggest anything about extending Section 48

> "* * * to authorize suits in districts other than those mentioned in that Act."[3]

in class action or otherwise.

Section 48 relates to the privilege of the defendant in suits for infringement. It has nothing to do with the privilege of the plaintiff to sue as representatives of a class or otherwise.

THE COMPLAINT DOES NOT STATE A CASE WITHIN RULE 23 R. C. P.

Rule 23 relating to class actions provides:

> "(a) Representation. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, * * *" R. C. P.

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[1] *National Hairdressers' & Cosmetologists' Assn., Inc., et al.* v. *Philad Co.*, 34 Fed. Supp. 264 (D. C., D. Del.).

[2] *The Crosley Corp.* v. *The Westinghouse Electric & Mfg. Co.*, 54 U. S. P. Q. 470 (C. C. A. 3).

[3] *Stonite Products Co.* v. *Lloyd Co.*, 315 U. S. 561, 86 L. Ed. 1026.

On page 17 of its brief, the petitioner says:

> "It is clear, therefore, that the members of the Association constitute a class so numerous and widely separated as to make it not merely impracticable, but impossible to bring all of them before any one court. This was not disputed * * *"

That statement could have only been made by inadvertence for it was disputed at the hearing and in the briefs below. And it is disputed here.

In *United States* v. *Association of American Railroads et al.*, 36 F. Supp. 225, D. C. District of Columbia, the Government brought all the members of the Association before the court.

That would seem to show that the members are not so numerous as to make it impracticable to bring them before the court. Hence the situation does **not** come within even the preliminary conditions defined by Rule 23 (a).

Prof. Moore says:

> "Where a hundred and one persons would ordinarily constitute such a class, the Oregon court denied the impracticability of joinder, since their affidavits had been secured. *Tobin* v. *Portland Mills Co.* (1902), 41 Ore. 269; 68 Pac. 743." Moore's Federal Practice under the New Rules, Vol. 2, p. 2231.

Below the petitioner sought to avoid the effect of *United States* v. *Association of American Railroads* on the ground that it was brought under the Sherman Act, but here and below the petitioner has relied on the *Coronado* case, which was also brought under the Sherman Act and did not involve the jurisdictional question here at issue or affect the jurisdiction in any way. (*Ex parte Edelstein*, 30 Fed. (2d) 636 at 638 (C. C. A. 2).)

It is true that the members of the Association cannot be brought before the court as defendants in a suit for infringement "without their consent," and they have not consented. But that is because the court has no jurisdiction over them under Section 48 of the Judicial Code—not because of their mere number. Every member of the Association except The Long Island Rail Road is given immunity for suit from infringement in the Southern District of New York. That jurisdictional limitation is a matter of substantive law, not subject to change by the New Rules (Rule 82) (and see *ante* pages 15 and 16).

NO FACTS ALLEGED TO SHOW ADEQUATE REPRESENTATION.

(Petitioner's Brief, p. 17.)

The Complaint (Sec. 4, R. 4 and 5) lists six railroad corporations and a director of the Association, and says:

> "* * * the above defendants, other than the defendant Association, constitute all the members, directors, or officers thereof, who are citizens or inhabitants of the said District, and they, as parties, fairly insure the adequate representation of the joint and common interests herein of defendant Association and of all its members as a class."

That list is now reduced to The Long Island Rail Road, the only member inhabitant of the Southern District of New York and the Director, F. E. Williamson, who, of course, is not a member.

No fact is alleged which if true, would support a conclusion that The Long Island Rail Road and Mr. Williamson fairly insure adequate representation of the joint and common interests of the defendant Association and all of its members as a class. The complaint is therefore fatally deficient.

By letter (R. 35 and 36) dated July 18, 1941, one week after the service of process, the plaintiff assured The Long Island Rail Road that by the suit, it did not charge the railroad with infringement or make any claim against the railroad. It completely absolved The Long Island from infringement and apologized for the suit.

The letter said:

> "This suit will place your Railroad at no trouble or expense because it is our understanding that the A. A. R. will defend this suit. Since your Railroad never used the A. A. R. magnetic car X-201 it will not be liable for damages for such use" (R. 36).

Surely, The Long Island Rail Road Company cannot fairly represent

> "* * * the joint and common interests herein of defendant Association and of all its members as a class." (Complaint, R. 5, lines 2, *et seq.*)

For the Association and the New York Central are charged with infringement.

Since the language of the Complaint is exactly the same with respect to Mr. Williamson as it is with respect to The Long Island, Mr. Williamson is at least in no better position to represent

> "* * * the joint and common interests herein of defendant Association and of all its members as a class."

Making Mr. Williamson a party and serving him with process must be less effective in getting jurisdiction over the Association and its members as a class than it was in getting jurisdiction over the New York Central, of which he is president. And the plaintiff no longer contends that

the court below had jurisdiction over the New York Central (R. 59 and Petition, pp. 2 and 3).

The presence of an officer among the named defendants does not give a Federal court jurisdiction over an unincorporated association.

In *Ex Parte Edelstein*[1] the president and four other officers were made parties, three of them were inhabitants of the Southern District of New York, but the court held that there was no jurisdiction.

In *Levering* v. *Morrin*[2], Morrin, individually and as president of one of the associations, was made a defendant, but it did not give the court jurisdiction.

Below the plaintiff cited the recent decision of this Court in *Hansbery* v. *Lee*[3] in support of its position. But the real effect of that decision is to show that proper representation should appear at the outset in a class action and that even a stipulation between those made parties is not sufficient to show that they fairly represent those who are absent.

ALLEGED CAPACITY MUST SHOW JURISDICTION.

(Petitioner's Brief, p. 18.)

On page 18 of its brief, the petitioner quotes Rule 9 (a) R. C. P. to the effect that it is not necessary to aver capacity of the party to sue or be sued, etc., but lightly overlooks the important exception:

> "* * * except to the extent required to show the jurisdiction of the court."

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[1] *Ex Parte Edelstein*, 30 Fed. (2d) 636 (C. C. A. 2).
[2] *Levering* v. *Morrin*, 61 Fed. (2d) 115 (C. C. A. 2).
[3] *Hansbery* v. *Lee*, 311 U. S. 32; 85 L. Ed. 22.

In the instant case proper representation by The Long Island Rail Road Company and Mr. Williamson is admittedly indispensable to jurisdiction in a class action. The complaint does not aver the authority of The I ong Island and Mr. Williamson to be

"sued in a representative capacity,"

hence, the complaint conclusively fails to make the necessary allegations of jurisdiction by failing to aver facts showing the indispensable authority.

The allegations were properly challenged by the Motion to Dismiss and the burden of supporting them was on the plaintiff, who did nothing but argue.[1]

The petitioner seeks to escape from this dilemma (Brief, p. 18) by pointing to Rule 9 (a) where it says:

> "When a party desires to raise an issue as to * * * the authority of a party to sue or be sued in a representative capacity, he shall do so by specific negative averment, which shall include such supporting particulars as are peculiarly within the pleader's knowledge."

Hence, it says the defendant Association has not complied with the Rule.

The answer is that a motion to dismiss is not a pleading.[2] The respondent Association has not filed answer. It is not a pleader, but a mover. It could have raised by Answer an issue about the authority of The Long Island

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[1] *McNutt* v. *General Motors*, 298 U. S. 178 at 189; 80 L. Ed. 1135 at 1141. *Kvos* v. *Associated Press*, 299 U. S. 269 at 278; 81 L. Ed. 183 at 188.

[2] Rule 7(b); Moore's Federal Practice under the New Rules, Vol. 1, p. 428.

and Mr. Williamson to be sued in a representative capacity, in which case it would have had to conform to the Rule about pleading. Instead, it chose to move to dismiss and thereby challenged the averments of the complaint in a proper manner. This threw the burden on the plaintiff of showing that it was properly in court and that burden has not been discharged.

DESIRABILITY OF REVIEW BY THIS COURT.

We understand that, after disputing the argument in support of the petition and making all reasonable refutation of the petitioner's position, it is our professional duty to submit anything in addition that may bear on the desirability or undesirability of review by this Court at this time, and it is in furtherance of this duty that we submit the following:

1. If we are right about the questions stated on page 2 of the petition being too broad and not being presented by the judgment and opinion of the Circuit Court of Appeals, review by this Court is neither desirable nor proper.

2. The proposed class suit was properly rejected by both of the courts below, and, there being no showing that a failure of justice will result without a class suit, there is no excuse for it. Concurrent correct decisions afford no occasion for the exercise of this Court's supervisory authority, and hence it seems that review as to the class action is undesirable.

3. The interpretation of Sec. 48 to attribute inhabitancy to the Association of American Railroads in the district where its principal place of business is located is without precedent and open to such question that the Circuit Court of Appeals should have affirmed the dismissal and left the petitioner to sue in one of the districts mentioned in Sec. 48 of the Judicial Code rather than letting that come after expensive and protracted litigation has been had.

(*Phillips et al.* v. *Baker, et al.*, 121 F. (2d) 752 at 755, C. C. A. 9; *Zimmers et al.* v. *Dodge Brothers, Inc.*, 21 F. (2d) 152 at 156, D. C. N. D. Ill.; *Candas et al.* v. *Agnini et al.*, 14 Fed. Supp. 21 at 22, D. C. S. D. N. Y.)

Circuit Judges Learned Hand and Augustus Hand declined to attribute citizenship to an unincorporated association when Circuit Judge Manton wrote his dissenting opinion in *Ex parte Edelstein*, 30 F. (2d) 636 at 639 and 640, C. C. A. 2. In that instance, the unincorporated association was organized under the General Association Laws of New York, its principal place of business was within the Southern District, its president, secretary, and treasurer, and all but sixty-two of its 8,000 or 10,000 members were citizens of New York, and it operated as a labor union under charter from the American Federation of Labor. In *Levering* v. *Morrin* (61 F. (2d) 115 at 118) Circuit Judges Manton, Learned Hand, and Swan declined to reverse the ruling of the majority in the *Edelstein* case. This court cited the *Levering* decision with approval in *Puerto Rico* v. *Russell*, 288 U. S. 476 at 480, 53 S. Ct. 447, 77 L. Ed. 903 at 907.

Until the petitioner had shown the court that the possibilities of jurisdiction over the Association under the second part of Sec. 48 had been exhausted, the Circuit Court of Appeals should not have ventured on the drastic interpretation of the term "inhabitant" in the first part of that section; for, if jurisdiction over an association is desirable or necessary under the first part of Sec. 48, the orderly procedure would be to make application to the Congress for legislation and give the whole country an opportunity to present its views to the Legislative Department of the Government on the need or desirability of such a change in the Statute that has endured for more than forty-five years without any plaintiff finding it necessary to raise the question of such a need or desire.

4. The decision and judgment of the Circuit Court of Appeals has left the suit in a very awkward condition. If the petitioner wishes to proceed against the Association, the issue must first be tried whether the Association's principal place of business is within the Southern District of New York. Assuming what we may well doubt, that the petitioner might succeed in convincing the District Court in this preliminary issue, the parties would then have to go through costly litigation to a judgment with the full knowledge that it might be upset by the Circuit Court of Appeals or by this Court for want of jurisdiction.

5. If the petitioner wishes to proceed against The Long Island Rail Road, the Rail Road must answer to the charge of infringement alleged to have been committed "by the A. A. R. and The New York Central" (R. 36), although the petitioner's letter to the Rail Road, written expressly to explain the suit, tells the Road that it is innocent of the alleged infringement, that no cause of action is stated or intended to be stated against the Road individually, that the suit will put the Road to no trouble or expense, and that, since the Road never used the A. A. R. magnetic car X-201, it will not be liable for damages for such use.

6. The decision and judgment of the Circuit Court of Appeals is probably in conflict with the applicable decisions of this Court as understood and applied by the Circuit Court of Appeals for the Eighth Circuit, as explained in the cross-petition No. 860 and the brief in support of it, pp. 12-15.

7. The opinion of Judge Frank that the Association should be suable in any district in which it has a principal place of doing business apparently conflicts with the settled doctrine of this Court that the law contemplates that every person or corporation shall have but one domicile. *Galveston et al.* v. *Gonzales*, 151 U. S. 496 at 506, 38

L. Ed. 248 at 252. Hence, if inhabitancy is to be imputed to the Association, it should have only one inhabitancy, and not several in different districts.

Respectfully submitted,

L. B. MANN,
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LOUIS J. CARRUTHERS,
Attorneys for Respondents.

April 17, 1943.

Service of the above, together with a copy of same, acknowledged this ..... day of April, 1943.

.....
For the Petitioner.